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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1961

No. 442

WILLIAM CHAE-SIK LEE and GRACE KOOM-SOON LEE,

Petitioners,

v.

ROBERT F. KENNEDY, Attorney General of the United States

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

JACK WASSERMAN,
DAVID CARLINER,
Warner Building,
Washington, D. C.,
Attorneys for Petitioners.

WASSERMAN & CARLINER,
Of Counsel.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit affirming a judgment of the District Court.

Opinions Below

The opinion of the Court of Appeals has not yet been reported and is set forth in the Appendix at pp. 21-25. The District Court filed no opinion. Its judgment is set forth at p. 27 of the Appendix.

Jurisdiction

The judgment of the Court of Appeals was entered on June 29, 1961. Jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

Questions Presented

1. Where the Immigration and Naturalization Service has relied upon an invalid administrative regulation to refuse to accept, to act upon, and to grant an application for permanent residence by an alien exchange visitor who had been declared by the Service to be urgently needed in the United States, may the Court of Appeals uphold the administrative decision by substituting an alternative ground?

2. Whether the denial of petitioners' applications for adjustment of their status in the United States may be sustained upon the basis of a regulation which gives retrospective operation to the Information and Educational Exchange Act, as amended, in the face of an explicit statutory directive that its provisions shall operate prospectively only.

3. Whether the provisions of the Information and Educational Exchange Act, as amended, which require that it shall apply only to persons "acquiring exchange visitor status subsequent to June 4, 1956", govern an alien who was admitted to the United States in the status of nonimmigrant student in 1953 and changed his status to that of an exchange visitor in 1954, but extended his stay in the United States as an exchange visitor after June 4, 1956.

4. Whether the regulation upon which the Attorney General bases his denial of petitioners' applications for adjustment of status in the United States is valid under Section 4 of the Administrative Procedure Act, when no notice of the

proposed rule making has been published in the Federal Register and when the proposed regulation deprives a class of nonimmigrant aliens of benefits to which there previously was no regulatory or statutory bar.

5. Whether the Attorney General may deny an application for adjustment of status in the United States by reason of petitioner's status as an exchange visitor where it appears that petitioner entered the United States as a nonimmigrant student, that after entry he sought permission to work as a medical intern, that he was advised by immigration officials that in order to work as a medical intern, he must establish that his employing hospital is a participant under the Exchange Visitor Program, and that such advice was incomplete in that three alternative methods were available by means of which the petitioner could have lawfully accepted employment as a medical intern, without acquiring exchange visitor status.

Statutes and Regulations Involved

Section 245 (a) of the Immigration and Nationality Act, as amended (8 U.S.C. 1255) provides:

> "The status of an alien who was admitted to the United States as a bona fide nonimmigrant may be adjusted by the Attorney General, in his discretion and under such regulations as he may prescribe, to that of an alien lawfully admitted for permanent residence if (1) the alien makes an application for such adjustment, (2) the alien is eligible to receive an immigrant visa and is admissible to the United States for permanent residence, (3) an immigrant visa was immediately available to him at the time of his application, and (4) an immigrant visa is immediately available to him at the time his application is approved.

A quota immigrant visa shall be considered immediately available for the purposes of this subsection only if the portion of the quota to which the alien is chargeable is undersubscribed by applicants registered on a consular waiting list."

Section 201 of the Information and Educational Exchange Act, as amended, 22 U.S.C. 1446(b)(1958 ed.), provides:

"No person admitted as an exchange visitor under this section or acquiring exchange visitor status after admission shall be eligible to apply for an immigrant visa, or for a nonimmigrant visa under section 1101(a)(15)(H) of Title 8, or for adjustment of status to that of an alien lawfully admitted for permanent residence, until it is established that such person has resided and been physically present in a cooperating country or countries for an aggregate of at least two years following departure from the United States: Provided, That upon request of an interested Government agency and the recommendation of the Secretary of State, the Attorney General may waive such two-year period of residence abroad in the case of any alien whose admission to the United States is found by the Attorney General to be in the public interest: And provided further, That the provisions of this subsection shall apply only to those persons acquiring exchange visitor status subsequent to June 4, 1956."

Section 4(a), (b) and (c) of the Administrative Procedure Act [5 U.S.C. 1003(a), (b) and (c)] provides:

"General notice of proposed rule making shall be published in the Federal Register (unless all persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law) and shall include (1) a state-

ment of the time, place, and nature of public rule making proceedings; (2) reference to the authority under which the rule is proposed; and (3) either the terms or substance of the proposed rule or description of the subjects and issues involved. Except where notice or hearing is required by statute, this subsection shall not apply to interpretative rules, general statements of policy, rules of agency organization, procedure, or practice, or in any situation in which the agency for good cause finds (and incorporates the finding and a brief statement of the reasons therefor, in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.

"After notice required by this section, the agency shall afford interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity to present the same orally in any manner; and, after consideration of all relevant matter presented, the agency shall incorporate in any rules adopted a concise general statement of their basis and purpose.

"The required publication or service of any substantive rule (other than granting or recognizing exemption or relieving restricting or interpretative rules and statements of policy shall be made not less than thirty days prior to the effective date thereof except as otherwise provided by the agency upon good cause found and published with the rule."

8 Code of Federal Regulations, Part 245.1 (1959 Supp.) provides:

"Part 245—Adjustment of Status of Nonimmigrant to That of a Person Admitted for Permanent Residence

"§245.1 Application. An alien whose deportability has not been established in proceedings under Part 242 of this chapter subsequent to August 21, 1958, may if he believes he meets the eligibility requirement of section 245 of the act, file an application Form I-507 with the district director in whose district he resides. A visa shall not be held to be available for a person claiming a preference quota or a nonquota status under section 101(a)(27)(A) or (F) unless a petition to accord such status has been approved in accordance with section 204 or 205 of the act. * * *"

F. R. Doc. 59-1599 (24 F. R. 1375) (1959) provides:

"Part 245—Adjustment of Status of Nonimmigrant to That of a Person Admitted for Permanent Residence

"The following amendment to Chapter I of Title 8 of the Code of Federal Regulations is hereby prescribed:

"Section 245.1 Application is amended by adding the following sentence immediately preceding the last sentence thereof to read as follows: 'No alien who has had the status of an exchange alien in the United States may apply for adjustment of status unless pursuant to section 201(b) of the United States Information and Educational Exchange Act of 1948, as amended, he has resided and been physically present in a cooperating country or countries for an aggregate of at least two years following departure from the United States or the Secretary of State has recommended that the two-year period be waived."

"This order shall become effective 30 days following publication in the Federal Register. Compliance with

the provisions of section 4 of the Administrative Procedure Act (60 Stat. 238; 5 U.S.C. 1003) as to notice of proposed rule making is unnecessary in this instance because the rule prescribed by the order relates to agency procedure."

Statement

Petitioner, William Chae-Sik Lee, is a Korean national who was lawfully admitted to the United States as a nonimmigrant student on November 15, 1953 (R. 9). He was first admitted to pursue the study of theology at the Dallas Theological Seminary but subsequently sought permission to work in the United States as a medical intern (R. 9, 11). He was advised by the Immigration and Naturalization Service that in order for him to accept employment as an intern, he must apply for a "Change of Status" (R. 11). Petitioner filed such an application, but was thereafter informed that his application did not have "sufficient supporting evidence" in the absence of a letter from the employing hospital stating whether it was a participant under the Exchange Visitor Program (R. 12). Upon submitting such information, *inter alia*, petitioner was permitted to be employed as an intern and his status was adjusted to that of exchange visitor on June 18, 1954 (R. 8).

His stay in the United States as an exchange visitor has been extended at various times since, namely, in 1955, 1956, 1957, and 1958. It expired finally on December 30, 1958. (Administrative Record, R. 16.)

Petitioner, Grace Koom-Soon Lee, is also a Korean national who was lawfully admitted to the United States as a nonimmigrant student on November 28, 1954 (R. 3, 6). She and the petitioner, William Chae-Sik Lee, were married in California on December 30, 1955 (R. 3, 6). Following the birth of a child, Mrs. Lee sought and was granted a

change of status to that of a visitor and her status, for purposes of the proceedings below, turns upon that of her husband (R. 15).

On August 5, 1959, the Order of the Sisters of St. Benedictine, operating the Hibbing General Hospital at Hibbing, Minnesota, filed a petition with Immigration and Naturalization Service to grant preferred immigrant status to the petitioner, William Chae-Sik Lee. In support of its petition, the hospital submitted an affidavit in which it stated that the Hibbing General Hospital serves a community of 20,000 people, that it had been in search of a medical anaesthesiologist for five years, that the petitioner was the first qualified person whose services it had been able to obtain, and that he would be the only anaesthesiologist in the entire Congressional District (R. 2, 3).

The Service thereafter, on August 28, 1959, determined that the petitioner is a person "whose services are needed urgently in the United States because of (his) high education, technical training, specialized experience or exceptional ability" by approving the petition filed by the Order of the Sisters of St. Benedictine (R. 3).

On September 22, 1959, petitioners filed applications with the Immigration and Naturalization Service for an adjustment of their status to that of permanent residents so that Dr. Lee could accept permanent employment as anaesthesiologist with the Hibbing General Hospital (R. 3, 4). The Service refused to act upon the application and on September 30, 1959, gave the following ground as the basis for its action:

> "Under the provisions of Sec. 245.1, Title 8, Code of Federal Regulations, we are prohibited from accepting the application of Dr. William Chae-Sik Lee. This section provides that no alien who has had the status

> of an exchange alien in the United States may apply for adjustment of status unless pursuant to Sec. 201(b) of the United States Information and Educational Exchange Act of 1948, as amended, he has resided and been physically present in a cooperating country or countries for an aggregate of at least two years following departure from the United States or the Secretary of State has recommended that the two year period be waived.
>
> "* * * Dr. Lee had the status of an exchange alien and has not had the required two years residence abroad, or a waiver thereof." (R. 3, 4.)

The action below was instituted on October 6, 1959, to obtain a judgment declaring that the refusal of Immigration and Naturalization Service to act upon and to grant petitioners an adjustment of their status to that of permanent residents is contrary to law (R. 2-5). Upon cross motions for summary judgment, the District Court entered summary judgment for the Attorney General (R. 12, 13).

On appeal to the District of Columbia Circuit, the petitioners urged that:

1. The Information and Educational Exchange Act of 1948, as amended on June 4, 1956 [22 U.S.C. 1446(b) (1958 ed.)] (70 Stat. 241) does not apply to an alien who acquired status as an exchange visitor prior to the date of the amendment.

2. The administrative regulation upon which the Immigration and Naturalization Service relied to deny petitioner consideration of his application for an adjustment of his immigrant status was adopted in violation of Section 4 of the Administrative Procedure Act, 5 U.S.C. 1003, Section 245 of the Immigration and Nationality Act, as

amended, 8 U.S.C. 1255, and of Section 201 of the Information and Educational Exchange Act, as amended, 22 U.S.C. 1446(b).

3. The Immigration authorities are barred from invoking the provisions of the Information and Educational Exchange Act, as amended, 22 U.S.C. 1446(b), (70 Stat. 241), against the petitioner by reason of the fact that his status as an exchange visitor, if it renders him ineligible to an adjustment of his status to that of a lawful permanent resident, resulted from an erroneous advice of the immigration officers.

The Court of Appeals below affirmed by a split decision (R. 15-21). It held that the petitioner had "acquired, from year to year, temporary exchange visitor status" and since "some of these acquisitions occurred after June 4, 1956" (the operative date of the relevant statute), the Act applied to the petitioner (Appendix, p. 22).

As to the administrative regulation, the Court below held, citing *Securities and Exchange Commission* v. *Chenery Corp.*, 318 U.S. 80, 87, 88, that error in the administrative determination is no basis for remand to the Immigration and Naturalization Service if the "*result is correct*". (Appendix, pp. 23-24).

The issue of mistake, which the petitioner urged, was decided adversely *sub silentio*.

Reasons for Granting the Writ

I

The issue whether a reviewing court may sub-titute its own grounds to uphold the action of an administrative agency has often been before this Court since the leading decisions in *Perkins* v. *Elg*, 307 U.S. 325 (1939); *Federal Communications Commission* v. *Pottsville Broadcasting*

Co., 309 U.S. 134 (1939); and *Securities and Exchange Commission* v. *Chenery Corp.*, 318 U.S. 80, 87, 88 (1942). Cf. *Securities and Exchange Commission* v. *Chenery*, 332 U.S. 194 (1946); *Federal Trade Commission* v. *Morton Salt Co.*, 334 U.S. 37 (19); *Federal Power Commission* v. *Idaho Power Co.*, 344 U.S. 19 (1952); *Federal Communications Commission* v. *RCA Communications, Inc.*, 346 U.S. 86 (1952); *Denver R.G.W.N.R. Co.* v. *Union P.R. Co.*, 351 U.S. 321, 341 (1955); *Vitarelli* v. *Seaton*, 359 U.S. 535 (1959); *Texas Gas Transmission Corp.* v. *Shell Oil Co.*, 363 U.S. 263 (1959); *American Trucking Association Inc.* v. *United States*, 364 U.S. 1 (1959).

Petitioner's application for permanent residence was refused by the Immigration and Naturalization Service upon the express and sole ground that its regulation forbade accepting such applications from any alien

> "*who has had* the status of an exchange alien in the United States * * *." 24 F.R. 1375, 8 Code of Federal Regulations 245.1 (1959 Supp.) (Emphasis supplied.)

in contradistinction to the statute which provides that the relevant prohibition

> "shall apply only to those persons acquiring exchange status subsequent to June 4, 1956." 70 Stat. 241,

[1] Petitioner *acquired* exchange visitor status prior to the effective date of this provision, namely, on June 18, 1954 (R. 9). The terms of the regulation thus apply to him by reason of his status as an exchange alien prior to June 4, 1956, and is, therefore, in conflict with the statute. Contrary to the assumption of the Court of Appeals, which it thought "worth noting" although "not necessary to the validity of the action the Attorney General took", the regulation could not be taken to apply to the petitioner "as an alien who has had (exchange) visitor" status up to the time when he applies for adjustment of status. (Appendix p. 25). Petitioner's status as an exchange visitor had expired on December 30, 1958, prior to his application for status as a permanent resident on September 22, 1959 (Administrative record, R. 3). The refusal of the immigration authorities to accept petitioner's application, moreover, was

22 U.S.C. 1446(b) (1958 ed.).

The Court of Appeals below held this ground error. In reaching its decision to affirm the administrative action, it held that the "decision 'already made should properly be based upon another ground' * * *" (Appendix, p. 24).

The Court then undertook to make a determination which was within the technical competence of the Immigration and Naturalization Service to make and which that agency had not made, namely, that the petitioner "acquired from year to year, temporary exchange visitor status". Because "some of these *acquisitions* occurred after June 4, 1956", the Court held that Section 201(b) of the statute may be substituted to support the administrative order (Appendix, pp. 22, 24). (Emphasis supplied.) See Point II, *infra*.

The decision thus made by a divided District of Columbia Circuit poses the question whether it exceeded the appropriate scope of judicial review of the administrative determinations of the Immigration and Naturalization Service.

This Court has recognized the importance of this problem when it has involved other administrative agencies. Cf. *Texas Gas Transmission Corp* v. *Shell Oil Co.*, 363 U.S. 263, 368 (1959); *American Trucking Associations, Inc.* v. *United States*, 364 U.S. 1, 13-14 (1959); *Federal Communications Commission* v. *RCA Communications, Inc.*, 346 U.S. 86, 91 (1952). See also *Kimm* v. *Rosenberg*, 363 U.S. 405, dissenting opinion at 412 (1959).

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expressly stated on September 30, 1959, to be based on the fact that he "*had* the status of an exchange alien * * *" (R. 4). The regulation, therefore cannot be "understood to mean" that it barred the petitioner because he "has had (exchange visitor) status up to the time" he applied for permanent residence. The Attorney General thus did not rely upon the statute "ultimately and in substance" any more than he did "immediately and in form". See Appendix, p. 25.

This Court has also had prior occasion to review and to reverse the interpretation which the District of Columbia Circuit has placed upon the holding in the two *Chenery* decisions. Cf. *Vitarelli* v. *Seaton*, 102 U.S. App. D.C. 316, 253 F. 2d 338, 342, reversed, 359 U.S. 535, 539, and separate opinion, 546, 547 (1958). The decision below plainly adheres to an interpretation of the *Chenery* doctrine which this Court has previously corrected.

Apart from the importance which the scope of judicial review of administrative decisions has had previously, legislation which has just been approved by Congress makes the role of the Circuit Courts of especial concern at the present time.

S. 2237, enacted by the 87th Congress on September 15, 1961,[2] [Section 5(a)], vests jurisdiction to review deportation orders of the Immigration and Naturalization Service in the Circuit Courts of Appeal in the first instance in place of the District Court, pursuant to the procedures prescribed by the Act of December 29, 1950, as amended, 64 Stat. 1129; 68 Stat. 961, 5 U.S.C. 1031, et seq. Cf. *Shaughnessy* v. *Pedreiro*, 349 U.S. 48.

Inasmuch as the Circuit Courts of Appeal will be assuming a larger role than formerly in the review of orders of the Immigration and Naturalization Service, it would seem appropriate to examine the bounds which govern the judicial review of its administrative decisions.

II

An important corollary to the first issue is whether the reviewing Court may interpose as a basis for its affirmance a determination which lies, initially, at least,

[2] Although the legislation has not yet been formally approved by the President, the judicial review provisions have been urged by the present Deputy Attorney General. See H. Rept. 1086, 87th Cong., 1st Sess., p. 25.

within the technical competence of the administrative agency and which that agency has not made.

The Court below, as petitioners have noted, ruled that the petitioner "acquired, from year to year, temporary exchange visitor status" (Appendix, p. 22).

Whether the petitioner "acquired" such status from year to year, or whether he "acquired" it when he obtained his exchange visitor status on June 18, 1954, and merely "*extended* his stay under the status already acquired, is, as is indicated by a reading of the relevant statute and the Questions Presented, the essential and ultimate issue to be decided.

What is important here is that the administrative agency "which Congress has established as the expert in this field" [*Denver R. G. W. N. R. Co.* v. *Union P. R. Co.*, 351 U.S. 321, 341 (dissenting opinion) (1955)] has not by decision, by statement of policy, or by regulation, made the determination essayed by the District of Columbia Circuit, namely, that the "acquisition of a status" and the "extensions of stays under that status" are equivalent.[3]

This, of course, is in conflict with the well-settled prin-

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[3] This determination, as petitioners note later, if not clearly error, is at best so dubious that an initial judgment of the question should be made by the administrative agency. The relevant provisions of the immigration statute, the regulations, and long-standing administrative practice all indicate that the "acquisition of status" is obtained by one type of proceeding and that the "extensions of stays" in the United States are obtainable in another type of proceeding. Cf. 8 U.S.C. 1184, 1255, 1258; 8 C.F.R. 214.4, 245, 248. See also S. Rep. 1515, 81st Cong., 2nd Sess., 1950, pp. 529-530; 591-611. In the latter proceeding in order for petitioner to be eligible for the extensions of his permission to remain in the United States as an exchange alien in 1955, 1956, 1957, and 1958, he was required to show that he "*is (then) maintaining* the nonimmigrant status under which he is permitted to remain in the United States". 8 C. F. R. 214.4. (Emphasis supplied.) The question, therefore, is: Does an alien *acquire* a status by its extension when such an extension is conditioned upon a showing that the alien has not only *previously acquired* such status but is *maintaining* it?

ciple of looking initially to the competent administrative agency for its determination of issues within its special experience and expertise. See *Norwegian Nitrogen Products Co.* v. *United States*, 288 U.S. 294, 315 (1932); *Rochester Telephone Corp.* v. *United States*, 307 U.S. 125 (1938); *South Chicago Coal & Dock Co.* v. *Bassett*, 309 U.S. 251 (1939); *Parker* v. *Motor Boat Sales*, 314 U.S. 244 (1941); *National Labor Relations Board* v. *Hearst Publications*, 322 U.S. 111, 131 (1943); *American Trucking Association* v. *United States*, 364 U.S. 1, 13-14 (1959); *Power Reactor Development Co.* v. *IUE*, 367 U.S. 396 (1960).

III

Should the Court of Appeals be believed to have acted within the scope of its reviewing function, a further issue is whether the District of Columbia Circuit properly construed the statute.

The statute, the Information and Exchange Act of 1948, as amended June 4, 1956, 22 U.S.C. 1446(b) (1958 ed.), 70 Stat. 241, provides that:

> "No person admitted as an exchange visitor * * * or acquiring exchange visitor status after admission, shall be eligible to apply for an immigrant visa * * * or for adjustment of status to that of an alien lawfully admitted for permanent residence, until it is established that such person has resided and been physically present in a cooperating country or countries for an aggregate of at least two years following departure from the United States * * *."

Two provisos were written into the 1956 amendment. The first, not relevant here, permits a waiver under certain conditions of the requirement of a two year residence abroad.

The second proviso explicitly and unambiguously states:

> " * * * the provisions of this paragraph *shall apply only to those persons acquiring exchange visitor status subsequent to the date of the enactment hereof.*" (Emphasis supplied.)

Two questions are posed by the construction of the statute adopted by the Court below, first, whether the Court properly interpreted its legislative history, and second, whether it applied the familiar principle of statutory construction which disfavors retroactivity except upon the clearest mandate.

(1) The Court of Appeals found support for its ruling that petitioner was barred from applying for permanent residence because of the extension of his stay in the United States as an exchange visitor after June 4, 1956, in a single sentence in the legislative report which accompanied the 1956 amendment. S. Rep. 1608, 84th Cong., 2nd Sess., p. 4. It states that the second proviso:

> "* * * is not intended to preclude the application of the 2-year-absence requirement to any exchange visitor who, subsequent to the enactment of the present bill, may apply for an extension of the period of time for which he was admitted."

This cautionary language, which merely *permits* the application of the terms of the amendment to exchange visitors who apply for extensions of stays after its effective date, was converted by the Court below into an "intended" and mandatory requirement (Appendix, p. 22).

It is significant, in view of the statement in the opinion of the Court of Appeals that the statute "has been understood and enforced * * * correctly" (Appendix, p. 22), that the Immigration and Naturalization Service adopted

no regulation to implement the 1956 amendment other than its 1959 amendment to 8 C.F.R. 245.1. This amendment, as we have noted earlier, broadly applies the provisions of the statute to any "alien who has had the status of an exchange alien in the United States", and manifestly does not reflect the intent of Congress.

By contrast, the State Department, which enforces the statute in connection with its function of issuing visas to intended immigrants, framed a regulation in 1956 to apply the 1956 amendment in express terms specifically to exchange visitors who obtained "extensions of the period of (their) temporary admission", 21 F. R. 6270 (1956), 22 C. F. R. 42.42(c) (1958 ed.). But the State Department did not view the sentence upon which the Court of Appeals relied as stating a mandatory formula. Instead of accepting the statutory date, June 4, 1956, referred to in the Senate Report, the State Department's regulation selected September 21, 1956, the effective date of the publication of its regulation.

(2) This Court has held that even where permissible, retroactivity is not favored except upon the clearest mandate. *Claridge Apts. Co.* v. *Commissioner of Internal Revenue*, 323 U.S. 141, 164 (1944). See also *Brewster* v. *Gage*, 280 U.S. 327, 337 (1929); *United States* v. *Magnolia Petroleum Co.*, 276 U.S. 160, 162 (1927); *Cox* v. *United States*, 260 U.S. 427, 434 (1922); *Reynolds* v. *McArthur*, 2 Pet. 417 (1829).

The statutory issue here is important for the guidance of the International Educational Exchange Program. While the undoubted legislative purpose of the Information and Educational Exchange Act of 1948, 62 Stat. 6, 22 U.S.C. 1431, is to promote an interchange of persons, knowledge and skill among the various cooperating countries, the provisions of 8 U.S.C. 1153(a)(1) equally indi-

cate a congressional intent to favor immigrants "whose services are needed urgently in the United States", and the provisions of 8 U.S.C. 1255, under which the petitioner applied, indicate that they should be able to become permanent residents without having to depart and reenter the United States.

A determination of the proper balance to be given to the conflicting congressional purposes, the interpretation and weight to be given to the legislative history of the 1956 amendment, and a determination of the effect of the rule that statutes are to be given, if possible, prospective operation—are issues which warrant consideration by this Court.

IV

A further question which the Court below did not reach in view of its disposition of the appeal is one which bears generally upon the conduct of administrative agencies.

The regulation upon which the Immigration and Naturalization Service relied to bar acceptance of the petitioner's application for permanent residence was adopted as an amendment to 8 C.F.R. 245.1 (1959 Supp.). It was published without compliance with Section 4 of the Administrative Procedure Act, 5 U.S.C. 1003, the reason being given that it "is unnecessary * * * because the rule relates to agency procedure" 24 FR 1375 (1959)

The reason patently is error and in violation of *Sibbach v. Wilson & Co.*, 312 U.S. 1, 14 (1940), which sets forth the test of a rule of procedure to be whether it determines substantive rights or whether it regulates the process "for enforcing rights and duties recognized by substantive law"

The regulation here plainly determined the substantive right of an alien in the United States to apply for status as a permanent resident. It is not without significance that both when the original regulation was published on November 6, 1952, 17 F.R. 9989, 10037, and when other

similar amendments were adopted in the very year of the amendment of February 25, 1959, the Immigration and Naturalization Service complied with the notice requirements of the Administrative Procedure Act. See especially 24 F.R. 2624 (April 4, 1959) amending 8 C.F.R. 245.

Failure to comply with the notice requirements of the Administrative Procedure Act has been held to render the regulation invalid. *Hausson Inc. v. United States*, 178 F. Supp. 922 (1959) (U. S. Customs Court); *Hotch v. United States*, 212 F. 2d 280 (9th Cir.) (1954). See also *Castle v. McLaughlin*, 106 App. D.C. 145, 270 F. 2d 448, 451 (1959), in which an amendment to the District of Columbia zoning regulations was declared invalid for failure to give the prescribed public hearing prior to the adoption of the amendment. See too, *Mahler v. Eby*, 264 U.S. 32, 44 (1923): "It is essential that where an executive is exercising delegated legislative power he should substantially comply with all the statutory requirements in its exercise • • •."

In view of the impact which this issue has upon the operation of all administrative agencies, it is urged that the question is of sufficient importance to justify review by this Court.

V

A final question which deserves consideration by this Court is whether the petitioner should not be relieved of any bar which may be invoked against him because of his status as an exchange visitor.

The record establishes that the petitioner became an exchange visitor, after his entry to the United States as a nonimmigrant student to study theology, upon the mistaken advice of the Immigration and Naturalization Service, that this status was required in order for him to accept employment as a medical intern.

This Court has held in *Moser* v. *United States*, 341 U.S. 41, 47 (1959), that mistake is available to relieve an alien of his status as a neutral alien who had been relieved from military service. See also *Podea* v. *Acheson*, 179 F. 2d 306 (C.A. 2, 1950); and *McLeod* v. *Peterson*, 283 F. 2d 180 (C.A. 3, 1960).

The Court below apparently believed that it need not discuss the issue of mistake. Yet it is especially in immigration proceedings where aliens unfamiliar with both the English language as well as the manifold obligations and measures of relief provided in the statutes and regulations rely upon the advice given them by government officials.

Needless to say, Immigration Service officers, like other humans, may err. An examination of the applicability of the doctrine of mistake in the relations between immigration officers and aliens in the United States is important for the guidance both of the administrative agency and the people whom they undertake to advise.

Conclusion

For the reasons given above, it is urged that a writ of certiorari should be granted.

JACK WASSERMAN,
DAVID CARLINER,
Warner Building,
Washington, D. C.,
Attorneys for Petitioners.

WASSERMAN & CARLINER,
Of Counsel.

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 15987

WILLIAM CHAE-SIK LEE and GRACE KOOM SOON LEE, *Appellants*,

v.

ROBERT F. KENNEDY, Attorney General of the United States, *Appellee*

Appeal from the United States District Court for the District of Columbia

Decided June 29, 1961

Mr. David Carliner, with whom *Mr. Jack Wasserman* was on the brief, for appellant.

Mr. Gilbert Zimmerman, Special Assistant United States Attorney, with whom *Messrs. Oliver Gasch*, United States Attorney at the time the brief was filed, and *Carl W. Belcher*, Assistant United States Attorney at the time the brief was filed, were on the brief, for appellee.

Before WILBUR K. MILLER, *Chief Judge*, and EDGERTON and BAZELON, *Circuit Judges*.

EDGERTON, *Circuit Judge*: Appellants, husband and wife, are Korean nationals. The husband was admitted to this country in 1953 as a non-immigrant student. It is not disputed that the wife's status for present purposes depends upon the husband's. In 1954 he applied for and obtained a temporary one year change of status to a non-immigrant exchange visitor under the United States Information and Educational Exchange Act of 1948. He applied for and obtained extensions of his exchange visitor status in 1955, 1956, 1957 and 1958. On September 22, 1959, he filed an application for an adjustment of his status to permanent resident alien. The Attorney General refused to accept the application because the appellant "had the status of an exchange alien and has not had the required two years residence abroad, or a waiver thereof".

Appellant seeks a judgment declaring that the Immigration and Naturalization Service's refusal to act upon his application and grant the adjustment of status is contrary to law, and an injunction restraining appellee from deporting appellants. This appeal is from a summary judgment for appellee.

Section 201(b) of the Information and Educational Exchange Act as amended in 1956 provides:

> "No person . . . acquiring exchange visitor status after admission shall be eligible to apply . . . for adjustment of status to that of an alien lawfully admitted for permanent residence, until it is established that such person has resided and been physically present in a cooperating country or countries for an aggregate of at least two years following departure from the United States: Provided . . . That the provisions of this subsection shall apply only to those persons acquiring exchange visitor status subsequent to June 4, 1956." 22 U.S.C. (1958 ed.) § 1446(b).

Appellant says the quoted proviso exempts him from the two-year absence requirement because he had acquired exchange visitor status before June 4, 1956. Appellee says "acquiring" applies to extensions as well as original acquisitions of exchange visitor status and therefore the proviso does not exempt appellant.

The report of the Senate Foreign Relations Committee contains this statement: "It should be emphasized . . . that the proviso is not intended to preclude application of the 2-year-absence requirement to any exchange visitor who, subsequent to the enactment of the present bill, may apply for an extension of the period of time for which he was admitted." S.Rep.No. 1608, 84th Cong., 2d Sess., p. 4. The Act has been understood and enforced, we think correctly, in the sense that the Committee and presumably Congress intended. Appellants did not acquire permanent status as exchange visitors, if indeed there is or was any such thing. They acquired, from year to year, temporary exchange visitor status. Some of these acquisitions occurred after June 4, 1956.

The Attorney General did not tell the appellant that the statute prohibited him from accepting appellant's application. He told him that § 245.1, Title 8, Code of Federal Regulations, prohibited acceptance of the application. That regulation, in its present form, took effect February 25, 1959. It provides that "No alien who has had the status of an exchange alien in the United States may apply for adjustment of status unless" he has met the requirements of Section 201(b). 24 F.R. 1375. Appellants say this regulation is invalid both because it is broader than the statute and because it was not adopted in accordance with the Administrative Procedure Act. Appellants argue that "If the regulation is invalid, the ground upon which the appellee has denied the appellants adjustment of their status to that of permanent residents . . . must fall and the decision below [must be] reversed." Appellants cite as supporting this proposition *Securities & Exchange Commission* v. *Chenery Corp.*, 318 U.S. 80, 87, 88.

In *Chenery* the Securities & Exchange Commission had based its order on what it believed, erroneously, to be a judicially established principle of equity. Actually the principle in question had not been established judicially, legislatively, or administratively. Although the Commission itself could have established the supposed principle if it had chosen to do so, the Supreme Court vacated the Commission's order. The Court said: "Since the decision of the Commission was explicitly based upon the applicability of principles of equity announced by courts, its validity must likewise be judged on that basis. The grounds upon which an administrative order must be judged are those upon which the record discloses that its action was based." *Id.* at 87.

The sentences just quoted from *Chenery*, read without the Supreme Court's explanation of them, would appear to sustain appellants' argument. But the explanation which immediately follows those sentences in the Court's opinion refutes the argument. The Court said: "In confining our review to a judgment upon the validity of the grounds upon which the Commission itself based its ac-

tion, *we do not disturb the settled rule* that, *in reviewing the decision of a lower court, it must be affirmed if the result is correct 'although the lower court relied upon a wrong ground or gave a wrong reason.' Helvering v. Gowran*, 302 U.S. 238, 245. The reason for this rule is obvious. *It would be wasteful to send a case back to a lower court to reinstate a decision which it had already made but which the appellate court concluded should properly be based on another ground within the power of the appellate court to formulate.* But it is also familiar appellate procedure that where the correctness of the lower court's decision depends upon a determination of fact which only a jury could make but which has not been made, the appellate court cannot take the place of the jury. *Like considerations govern review of administrative orders.* If an order is valid only as a determination of policy or judgment which the agency alone is authorized to make and which it has not made, a judicial judgment cannot be made to do service for an administrative judgment." (Emphasis added.) *Id.* at 88. This makes it clear that the Court's statement, "The grounds upon which an administrative order must be judged are those upon which the record discloses that its action was based", is to be understood with a qualification; the order must be judged upon the grounds upon which action was based, unless the appellate court concludes that the decision "already made . . . should properly be based on another ground within the power of the appellate court to formulate."

The qualification covers this case: In *Chenery*, remand was necessary because the administrative order was "valid only as a determination of policy or judgment which the agency alone is authorized to make and which it has not made". In the present case, on the other hand, the decision "already made . . . should properly be based on another ground", *i.e.* the statute. Section 201(b) of the statute requires that relief be denied to these appellants. Remand would therefore be "wasteful". If there were a remand, the Attorney General would necessarily take the action he has already taken. It is immaterial that he would not explain his action as he has already explained

it. Since nothing required the Commission, in *Chenery*, to take on remand the action it had already taken, the Supreme Court's decision in *Chenery* does not apply to this case.

Though it is not necessary to the validity of the action the Attorney General took, it is perhaps worth noting that ultimately and in substance, though not immediately and in form, he relied on the statute. For the following reasons, in practical effect the regulation meant no more than the statute. An alien who, in the language of the regulation, "has had" the status of an exchange alien, may be understood to mean an alien who has had that status up to the time when he applies for adjustment of status. Appellee says, and appellants do not deny, that "No exchange visitor admitted to the United States before February 25, 1959—the date when this particular regulation was first promulgated in the indicated form—could still have been enjoying exchange-visitor status in the United States as of February 25, 1959 (or the present time) without having sought and procured an extension of extensions of stay as an exchange visitor after enactment of the 1956 amendment." It follows that although the words of the regulation appear broader than those of the statute, the regulation like the statute actually applies to "persons acquiring exchange visitor status subsequent to June 4, 1956" and to no other persons.

Affirmed.

WILBUR K. MILLER, *Chief Judge*, dissents.

Filed, June 29, 1961, Joseph W. Stewart, clerk

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1960.

Civil 2796-59

No. 15,987

William Chae-Sik Lee and Grace Koom-Soon Lee,
Appellants,

v.

Robert F. Kennedy, Attorney General of the United States,
Appellee.

Appeal from the United States District Court for the District of Columbia

Before: WILBUR K. MILLER, Chief Judge, and Edgerton and Bazelon, Circuit Judges.

JUDGMENT

This cause came on to be heard on the record on appeal from the United States District Court for the District of Columbia, and was argued by counsel.

On consideration whereof, It is ordered and adjudged by this Court that the judgment of the District Court appealed from in this cause be, and it is hereby, affirmed.

Opinion per Circuit Judge EDGERTON,
Chief Judge WILBUR K. MILLER, dissents.

Dated June 29, 1961.

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Civil Action No. 2796-59

WILLIAM CHAE-SIK LEE, Hibbing General Hospital, Hibbing, Minnesota, and GRACE KOOM-SOON LEE, Hibbing General Hospital, Hibbing, Minnesota, *Plaintiffs*,

v.

WILLIAM P. ROGERS, Attorney General of the United States *Defendant*

Filed June 14, 1960

ORDER AND JUDGMENT

The Court having considered defendant's Motion for Summary Judgment, plaintiffs' Cross-Motion for Summary Judgment, the pleadings, certified administrative records, and memoranda of the parties; and the Court having heard the argument of counsel and taken the matter under advisement; and the Court having determined that there is no genuine issue as to any material fact herein, and that defendant is entitled to judgment as a matter of law, it is on this 14th day of June, 1960:

ORDERED, ADJUDGED and DECREED, that defendant's Motion for Summary Judgment be and hereby is granted; and

FURTHER ORDERED, ADJUDGED and DECREED, that plaintiffs' Motion for Summary Judgment be and hereby is denied, and their action dismissed.

(s) JOSEPH C. MCGARRAGHY,
Judge.

(8663-7)

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In the Supreme Court of the United States

OCTOBER TERM, 1961

No. 442

WILLIAM CHAE-SIK LEE AND GRACE KOOM SOON LEE,
PETITIONERS

v.

ROBERT F. KENNEDY,
ATTORNEY GENERAL OF THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 21-25) is reported at 294 F. 2d 231.

JURISDICTION

The judgment of the court of appeals was entered on June 29, 1961. The petition for a writ of certiorari was filed on September 23, 1961. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether a court, in affirming an administrative decision which does not involve a determination either of factual issues or of administrative policy, may rest its decision upon legal grounds differing slightly from those of the administrative agency.

2. Whether it was proper to apply to petitioners the statutory requirement that an exchange visitor return to his own country for a period of two years before being admitted for permanent residence in the United States.

STATUTES AND REGULATIONS INVOLVED

1. Section 2 of the United States Information and Educational Exchange Act of 1948, 62 Stat. 6, 22 U.S.C. 1431, provides in pertinent part:

> The Congress declares that the objectives of this chapter are to enable the Government of the United States to promote a better understanding of the United States in other countries, and to increase mutual understanding between the people of the United States and the people of other countries. Among the means to be used in achieving these objectives are—
>
> * * * *
>
> (2) an educational exchange service to cooperate with other nations in—
>
> (a) the interchange of persons, knowledge, and skills;
>
> (b) the rendering of technical and other services;

(c) the interchange of developments in the field of education, the arts, and sciences.

2. Section 201 of the Act, 62 Stat. 7, 22 U.S.C. 1446(a), provides (as it appears in the United States Code):

> The Secretary [of State] is authorized to provide for interchanges on a reciprocal basis between the United States and other countries of students, trainees, teachers, guest instructors, professors, and leaders in fields of specialized knowledge or skill and shall wherever possible provide these interchanges by using the services of existing reputable agencies which are successfully engaged in such activity. The Secretary may provide for orientation courses and other appropriate services for such persons from other countries upon their arrival in the United States, and for such persons going to other countries from the United States. When any country fails or refuses to cooperate in such program on a basis of reciprocity the Secretary shall terminate or limit such program, with respect to such country, to the extent he deems to be advisable in the interests of the United States. The persons specified in this section shall be admitted as nonimmigrants under section 1101(a)(15) of Title 8, for such time and under such conditions as may be prescribed by regulations promulgated by the Secretary of State and the Attorney General. A person admitted under this section who fails to maintain the status under which he was admitted or who fails to depart from the United States at the expiration of the time for which he was admitted, or who engages in activities of a political nature detrimental to the interests of the United States, or in activities

not consistent with the security of the United States, shall, upon the warrant of the Attorney General, be taken into custody and promptly deported pursuant to sections 1251-1253 of Title 8. Deportation proceedings under this section shall be summary and the findings of the Attorney General as to matters of fact shall be conclusive. Such persons shall not be eligible for suspension of deportation under section 1254 of Title 8.

3. The Immigration and Nationality Act of 1952 amended Section 201 of the Exchange Act, *supra*, p. 3, to make its statutory references conform to the new provisions of the Immigration and Nationality Act (66 Stat. 276-277). It also provided, by Section 245 (8 U.S.C. 1255), as follows:

(a) The status of an alien who was lawfully admitted to the United States as a bona fide nonimmigrant and who is continuing to maintain that status may be adjusted by the Attorney General in his discretion (under such regulations as he may prescribe to insure the application of this paragraph solely to the cases of aliens who entered the United States in good faith as nonimmigrants) to that of an alien lawfully admitted for permanent residence as a quota immigrant or as a nonquota immigrant under section 101(a)(27)(A), if (1) the alien makes application for adjustment, (2) the alien is admissible to the United States for permanent residence under this Act, (3) a quota or nonquota immigrant visa was immediately available to him at the time of his application for adjustment, (4) a quota or nonquota immigrant visa is immediately available to him at the time his

application is approved, and (5) if claiming a nonquota status under section 101(a)(27)(A) he has been in the United States for at least one year prior to acquiring that status. A quota immigrant visa shall be considered immediately available for the purposes of this subsection only if the portion of the quota to which the alien is chargeable is undersubscribed by applicants registered on a consular waiting list. Any alien who shall file an application for adjustment of his status under this section shall thereby terminate his nonimmigrant status.

(b) Upon the approval of an application for adjustment made under subsection (a), the Attorney General shall record the alien's lawful admission for permanent residence as of the date the order of the Attorney General approving the application for the adjustment of status is made, and the Secretary of State shall reduce by one the quota of the quota area to which the alien is chargeable under section 202 for the fiscal year current at the time such adjustment is made.

* * * *

4. Following enactment of the Immigration and Nationality Act of 1952, regulations were promulgated on December 18, 1952. Section 214j.4 of 8 C.F.R. (17 F.R. 11495) provides as follows:

> A nonimmigrant of the class described in this part shall be admitted on the condition that he agrees not to apply for a change of the nonimmigrant status under which he is admitted to any other class or classes of nonimmigrant pursuant to section 248 of the act, or adjustment of status to that of a permanent resident pursuant to section 245 of the Act * * *.

5. On June 4, 1956, Section 201 of the United States Information and Educational Exchange Act of 1948, *supra*, p. 3, was further amended by the addition of another paragraph, 70 Stat. 241, 22 U.S.C. 1446(b), which provides as follows:

> No person admitted as an exchange visitor under this section or acquiring exchange visitor status after admission shall be eligible to apply for an immigrant visa, or for a nonimmigrant visa under section 1101(a)(15)(H) of Title 8, or for adjustment of status to that of an alien lawfully admitted for permanent residence, until it is established that such person has resided and been physically present in a cooperating country or countries for an aggregate of at least two years following departure from the United States: *Provided*, That upon request of an interested Government agency and the recommendation of the Secretary of State, the Attorney General may waive such two-year period of residence abroad in the case of any alien whose admission to the United States is found by the Attorney General to be in the public interest: *And provided further*, That the provisions of this subsection shall apply only to those persons acquiring exchange visitor status subsequent to June 4, 1956.

6. Section 245.1 of 8 C.F.R. (24 F.R. 1375) provides in pertinent part (amendment of February 18, 1959):

> * * * No alien who has had the status of an exchange alien in the United States may apply for adjustment of status unless pursuant to section 201(b) of the United States Information and Educational Exchange Act of 1948, as

amended, he has resided and been physically present in a cooperating country or countries for an aggregate of at least two years following departure from the United States or the Secretary of State has recommended that the two-year period be waived.

STATEMENT

Petitioners, who are Korean nationals, filed an action in the United States District Court for the District of Columbia for a declaratory judgment and review of the refusal by the Attorney General to adjust their status from that of exchange visitors to permanent residents (J.A. 2-5).[1] On the motions of both parties for summary judgment,[2] the court gave judgment for defendant (Pet. App. 27). The court of appeals affirmed, Judge Wilbur K. Miller dissenting without opinion (Pet. App. 21-26). The facts may be summarized as follows:

1. Petitioner William Chae-Sik Lee, a Korean doctor, was admitted to this country on November 15, 1953, as a non-immigrant student, for the purpose of attending the Dallas Theological Seminary.[3] In

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[1] "J.A." refers to the joint appendix in the court of appeals filed in this Court. "R." refers to the record in the district court, lodged with the Court. "Exh. A" and "Exh. B" are government exhibits filed with the district court and contain the pertinent records of the Immigration and Naturalization Service relating to petitioner William Lee and petitioner Grace Lee, respectively.

[2] Petitioners' cross motion for summary judgment stated, "There exists no factual issue and plaintiffs are entitled to summary judgment as a matter of law."

[3] This petitioner's Temporary Entry Permit gave as his intended length of stay four years and included the fol-

April 21, 1954, while he was a student at that institution, he inquired of the Immigration and Naturalization Service at Dallas whether he could accept an internship at the United Hospital of Port Chester, New York. On April 23, the Service replied that inasmuch as he had entered as a student to attend the Dallas institution he would not be eligible to take the suggested employment without a change of status. If he desired to apply therefor and presented bona fide reasons, he should do so by a form which was enclosed (J.A. 11). On May 27, 1954, the Service acknowledged receipt of petitioner's application for change of his non-immigrant status and requested that he obtain additional documents and attend a hearing on June 8, 1954 (J.A. 12). Following the hearing, which was not reported, petitioner was notified on June 18 that his change of status was approved. He was told (Exh. A 63):

> We are returning herewith your Korean passport and the Form I-94 which has been executed to show your present status in the United States and your admission until June 15, 1955.

Petitioner was instructed that the change was conditioned on his maintaining the status of an exchange visitor under the program at the Port Chester Hospital, and that if he wished to change to another approved program he should obtain advance permission to do so.

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lowing (J.A. 9): "The holder agrees to: (1) Depart from the United States at the expiration of stay authorized by the U. S. Immigration and Naturalization Service; (2) Abide by the terms and conditions of his admission and (3) Surrender this document at time of departure."

On May 13, 1955, the petitioner was released by the Port Chester Hospital to accept an internship at a hospital in Orange County, California (Exh. 61-62). On May 24, 1955, he applied for an extension of his temporary stay, stating that he did not intend to abandon his residence in Seoul, Korea. This extension was granted (Exh. A. 60).

On December 30, 1955, Dr. Lee was married to petitioner Grace Koom-Soon Lee (Exh. B 18), who had been admitted as a non-immigrant student from Korea in 1954 (Exh. B 20). On December 23, 1957, following the birth of a child, Mrs. Lee was granted a change of status and extension of stay to conform to that of her husband (Exh. B 14). Her status turns upon that of her husband (Pet. 8).

On June 11, 1956, Dr. Lee (hereinafter referred to as "petitioner") was accepted for graduate medical training in anesthesiology at Lloyd Noland Hospital, in Fairfield, Alabama (Exh. A 58). On October 12, 1956, he wrote to the Immigration and Naturalization Service at Atlanta, requesting an extension of his temporary stay. On October 23, 1956, the Service returned petitioner's application, informing him that present law and regulations provided that exchange visitors admitted to the United States after June 4, 1956, or who otherwise acquired such status after that date, and exchange visitors granted extensions of temporary stay after September 21, 1956, were ineligible to have their status changed to that of permanent resident without returning either to their own country, or to another country cooperating in the exchange program, for a period of two years.

Accordingly, petitioner's application was returned to him with the information that it might be resubmitted if he signed at the bottom of the notifying letter his acknowledgment that he had been informed of this condition. If he did not desire to resubmit his application, it would be necessary for him to leave the United States at the termination of his present extension. Petitioner signed the acknowledgment and returned the application on November 20, 1956 (Exh. A 55). A new extension was then granted to June 30, 1957 (Exh. A. 35), and thereafter a further extension to terminate on December 30, 1958 (Exh. A 37).

On June 25, 1957, petitioner was released by the Lloyd Noland Hospital to attend the University of Minnesota for the purpose of majoring in anesthesiology (Exh. A 49).

2. On June 27, 1957, petitioner wrote to the Immigration and Naturalization Service, at St. Paul, stating that he wished to become a permanent resident of the United States and to apply for a waiver of the two-year absence requirement. He said (Exh. A 40):

> I am aware that I should leave the United States if my application is denied. In case this happens, I will apply for an immigration visa after two years stay in my home country.

Following the forwarding of his application by the District Director, the Department of State answered on August 22, 1958 (Exh. A 25-26):

> The Department is unable to consider favorably recommending the granting of a waiver on the ground that an exchange visitor's services

> are required in the United States unless a request is received from an interested United States Government agency showing that the exchange-visitor's ineligibility for permanent resident status is clearly detrimental to a program or activity of official interest to such agency. No such request has been received in Dr. Lee's case. Additionally, the Department wishes to point out that the Korean government has expressed to the Department the need of American-trained physicians in Korea. In this connection, it is pointed out that the Korean exchange visitors are granted permission by their Government to come to the United States only on the understanding that they will study subjects which they can utilize in Korea and on the understanding that they will return to Korea at the termination of their training in this country.

On August 28, 1958, petitioner's application for a waiver was denied. He was notified that if he applied for an extension of his stay until June 30, 1959, and made necessary arrangements as to his Korean passport and his travel reservations, the extension would be granted (Exh. A 23-24). On April 24, 1959, petitioner was notified that he should leave the country by June 30, 1959 (Exh. A 20).

On August 5, 1959, petitioner's counsel submitted to the Immigration and Naturalization Service, at Duluth, a letter from the Hibbing General Hospital, of Hibbing, Minnesota, stating the hospital's need for an anesthesiologist, that petitioner was the only qualified person willing to accept the position, and that he would be the only anesthesiologist in the congressional

district outside Duluth. It was requested that petitioner be given a first preference status under the immigration quota (Exh. A 19, 8-9). The Service returned the request to petitioner's counsel, stating that petitioner was ineligible until he had fulfilled the requirement of two years residence in his home country or another cooperating country (Exh. A 18). Counsel then requested that the "petition" of the hospital be "adjudicated notwithstanding that the beneficiary, according to the present regulations of the Service, may not be eligible for adjudication of his status under section 245 of the Act", and inquired if the Director's ruling was subject to appeal (Exh. A 17). On August 18, the Service wrote counsel that, although petitioner was presently ineligible for adjudication of status because of noncompliance with the two-year absence requirement, if counsel wished to resubmit the "petition for first preference status" it would be adjudicated (Exh. A 16). Counsel did so, explaining that he wished to exhaust his administrative remedies (Exh. A 5), and the Service approved the petition on August 28, 1959 (Exh. A 4).

Counsel wrote the Service on September 22, 1959, that by reason of such approval petitioner was eligible for preference quota status and that petitioner believed he was admissible for permanent residence because he acquired the status of exchange visitor prior to the effective date of the 1956 statute establishing the two-year absence requirement (Exh. A 2). On September 30, 1959, the Service wrote to petitioner's counsel that the application was rejected because of noncompliance with the two-year absence require-

ment, citing 8 C.F.R. 245, but not referring to Section 201 of the Exchange Act, as amended in 1956 (Exh. A 1).

On October 6, 1959, petitioner filed the present action for review (J.A. 2-5).

ARGUMENT

1. Petitioner's primary argument stresses that the letter of the Immigration and Naturalization Service to petitioner, dated September 30, 1959 (*supra*, pp. 12-13), based the denial of petitioner's application for a change of status upon the regulation (8 C.F.R. 245.1, *supra*, pp. 6-7), whereas the court of appeals based its holding on the statute (Section 201, *supra*, pp. 3-4, as amended, p. 6). The claim is that the statute and the regulation differ significantly, and that in such a situation, where the administrative agency places its ruling on the regulation but not the statute, the reviewing court cannot affirm on the basis of the statute alone but must remand to the agency. Here, as the court of appeals pointed out (Pet. App. 25), both the statute and the regulation provide essentially the same rule, *i.e.*, that the two-year absence requirement applies to exchange visitors whose stay is extended after June 4, 1956. However, there is no real substance to petitioner's contention even if the statute and regulation are viewed as differing materially.

The principle that the reviewing courts will not venture into the administrative field to make determinations of policy or findings of fact, which the

administrative agency alone is empowered to make,' has no application where the only issue is a purely legal one and there are no factual issues left unresolved. *Texas Gas Corp.* v. *Shell Oil Co.*, 363 U.S. 263; *Federal Communications Commission* v. *RCA Communications, Inc.*, 346 U.S. 86, 91. In this case, there was no question of fact, as petitioners expressly acknowledged in their cross motion for summary judgment (see *supra*, p. 7, note 2), and the dispositive issue is a statutory one. The case can wholly turn upon the interpretation to be placed upon the 1956 amendment to the Exchange Act, a pure legal question which the courts are fully competent to decide. As was pointed out in *Securities and Exchange Commission* v. *Chenery Corp.*, 318 U.S. 80, 88, where no determination of fact or of administrative policy is involved, it would be folly to send a case back to have a ruling or judgment reinstated upon another ground within the power of the appellate court to formulate and prescribe.

2. Secondarily, petitioners urge that, if it be determined that the court of appeals acted within its reviewing power, it misconstrued the statute. This position is not tenable in view of the history and pattern of the legislation, and in any event is not a question of sufficient general importance for this Court to consider.

The United States Information and Educational Exchange Act of 1948 stated that its purpose was

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[1] See *Federal Power Commission* v. *Idaho Power Co.*, 344 U.S. 17; *Securities and Exchange Commission* v. *Chenery Corp.*, 318 U.S. 80.

"to increase mutual understanding between the people of the United States and the people of other countries" by the "interchange of persons, knowledge, and skills". Section 201 of the Act provided for the interchange with other countries of students, teachers and persons with specialized skills, to enter as non-immigrant visitors for business, for such time and under such conditions as might be prescribed by regulations promulgated by the Secretary of State and the Attorney General (*supra*, pp. 3-4).

While the Exchange Act was not an immigration measure, Section 201 necessarily had to be correlated with immigration policy and was therefore re-examined in the studies preliminary to the Immigration and Nationality Act of 1952. In reporting the first draft of this bill in 1950, the Senate Judiciary Committee stated that the testimony before the committee was almost unanimous that persons entering under the exchange program should carry out its purpose by returning to their native countries, and should not remain in this country as permanent residents. The report (S. Rep. No. 1515, 81st Cong., 2d Sess., p. 493) mentioned that this was shown by the provisions of Section 201 of the Exchange Act itself. The only amendments suggested for that section were to bring up to date its references to other statutes. The Immigration and Nationality Act, in Section 245 (8 U.S.C. 1255), also enacted a general provision permitting non-immigrants to adjust their status to that of permanent residents without having to undergo deportation proceedings. That it was not intended that this should apply to exchange visitors

was shown when the bill was reported to the Senate:[5]

> (A)pplicants for exchange visitor visas formally agree to return to their own country as a condition of their admission as exchange visitors and * * * the Department of State seeks to enforce their return as a matter of policy * * *.

The 1956 amendment to the Exchange Act (*supra*, p. 6) was intended to strengthen and support this policy of returning exchange visitors to their native lands, rather than to encourage their remaining here where their specialized skills opened up opportunities in this country superior to those which would be available if they went home. Exchange visitors had discovered a way to avoid the restriction placed upon them by going to Canada or Mexico and re-entering from there under their country's quota. In order to plug this loophole, an amendment to Section 201 was passed on June 4, 1956, making exchange visitors ineligible either for immigrant visas or for adjustment of their status unless they first returned to their native countries, or to another country cooperating in the program, for a period of two years. *Supra*, p. 6.[6] The purpose of the provision, as explained

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[5] S. Rep. No. 1608, 84th Cong. 2d Sess., p. 4. No House Report was submitted on this phase of the legislation. The Senate bill was passed in lieu of the House bill. U. S. Code Cong. and Admin. News, 1956, Vol. 2 2662, 2665.

[6] Representative Walter of Pennsylvania, co-author of the Immigration and Nationality Act of 1952, stated that the Department of State had reported that as many as sixteen foreign countries had indicated an intention to withdraw from the program if the United States continued to keep the best trainees for its own use. 105 Cong. Rec. 1952-53 (February 5, 1959).

in Senate Report No. 1608, 84th Cong. 2nd Sess., pp. 2-3, was to make it "perfectly clear to all concerned—Federal agencies, American individuals or organizations interested in the permanent sojourn of exchange visitors, the American public and, above all, the foreign nationals themselves—that the exchange program is not an immigration program and should not be used to circumvent the operation of the immigration laws." The reasons for the proviso upon which petitioners rely and its non-applicability to exchange visitors who thereafter might receive extensions of their temporary stay, were fully explained (*id.* 3-4):

> The committee was also concerned that S. 2562 as introduced might have been construed as applying not only to future exchange visitors but to those individuals who may have acquired exchange-visitor status prior to the enactment of the measure. It was felt that to attach a requirement of 2 years' waiting period after an exchange visitor has left the United States would be to impose a condition with respect to those now in the country which was not applicable at the time they accepted exchange-visitor status and which might have induced them to refuse it.
>
> Accordingly, to make clear that the measure was not intended to be retroactive, the committee voted to add an additional proviso, immediately after the words "public interest" ending the last sentence of the bill as introduced, in the following form:
>
> > *And provided further*, That the provisions of this paragraph shall apply only to those persons acquiring exchange-visitor status

> subsequent to the date of the enactment hereof.
>
> It should be emphasized, however, that the proviso is not intended to preclude application of the 2-year-absence requirement to any exchange visitor who, subsequent to the enactment of the present bill, may apply for an extension of the period of time for which he was admitted.

Petitioner urges for the first time in this Court that the expressed intention not to "preclude application of the 2-year-absence requirement" is to be interpreted as merely permissive and "cautionary".[7] In view of the overall purpose of the amendment to prevent the very evil which this case exemplifies, as forcefully expressed both in committee report and in debate, the committee's words can only be understood as meaning that the proviso was not intended to prevent, stop, hinder, or impede the application of the two-year provision to exchange visitors who thereafter applied for an extension.

3. Petitioner's ambiguous claim that he had somehow acquired, before June 1956, a more or less permanent status which was subject to extension is plainly contrary to the express language of the only document upon which such a claim could be based. Following the hearing of June 8, 1954, on petitioner's application for change of status, he was notified that his application was granted and that there was being returned his Form I-94 "which has been executed to

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[7] Petitioner's contention in the court of appeals was that the language of the statute was so unambiguous that no occasion existed for examining its legislative history.

show your present status in the United States and your admission until June 15, 1955". *Supra*, p. 8. That was the only benefit and status conferred at that time. The later extension in 1956, after the two-year absence requirement was imposed, was granted only after this condition was carefully explained and petitioner acknowledged in writing his acceptance thereof (*supra*, pp. 9-10). There was nothing retroactive in such acceptance; it was prospective only, covering any future extension. That petitioner fully understood the conditions of his presence in this country is further shown by his letter asking for waiver of the two-year absence provision, in which he acknowledged that if his request was denied he would have to leave this country for a period of two years (*supra*, p. 10).

4. Petitioner also contends that the Immigration and Naturalization Service gave him erroneous advice in telling him that a change in his status would be necessary before he could accept an internship in Port Chester (*supra*, p. 8). Other than by making the general assertion that there were three other alternatives available, none of which is specified, petitioner does not intimate in what respect this advice was in error. It appears to have been entirely sound, as petitioner, who was admitted as a nonimmigrant student to complete a four-year course of study at the Dallas Theological Seminary, obviously could not accept an internship in New York without a modification of his status. In no way was the change urged upon him; it was made to accommodate him upon his own request.

5. Finally, it should be pointed out that petitioner does not claim to come within the terms of the first proviso to Section 201, *supra*, p. 6 (Pet. 15). In this connection it should be noted that there was no finding by the Attorney General that petitioner is a person "whose services are needed urgently in the United States because of (his) high education, technical training, specialized experience or exceptional ability", as asserted by petitioner (Pet. 8). The approval of the request of the Hibbing General Hospital to grant petitioner a first preference status, as far as his country's immigration quota was concerned, had nothing to do with his eligibility for adjustment of status while remaining in this country—as the Service was at pains to point out repeatedly during the course of the correspondence (*supra*, pp. 12-13). In view of the terms upon which his government consented to his sojourn here, good faith on the part of both petitioner and respondent requires that those terms be observed.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ARCHIBALD COX,
Solicitor General.

HERBERT J. MILLER, JR.,
Assistant Attorney General.

BEATRICE ROSENBERG,
KIRBY W. PATTERSON,
Attorneys.

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